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No. 00-568

IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK and THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

-v-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

POINT I 1

FERC AND ITS SUPPORTERS HAVE FAILED TO ANSWER THE STATES' SHOWING THAT THE D.C. CIRCUIT APPLIED THE WRONG STANDARD OF REVIEW, MISREAD FLORIDA POWER & LIGHT, RAN AFOUL OF TEACHINGS OF THIS COURT, AND IGNORED THE WILL OF CONGRESS IN AFFIRMING FERC'S PREEMPTION OF STATE REGULATION OF THE TRANSMISSION OF ELECTRICITY FROM SELLERS TO RETAIL CUSTOMERS IN THE SAME STATE 1

A. Florida Power & Light/Deference 2

B. FERC's Reversal of Position 5

C. Section 212(h) 6

D. The Retail/Wholesale "Bright Line" 6

E. Order 888's Impracticality 7

POINT II 7

FERC HAS FAILED TO JUSTIFY THE D.C. CIRCUIT'S AFFIRMANCE OF ITS PRE-EMPTION OF STATE REGULATION OF LOCAL DISTRIBUTION FACILITIES USED FOR WHOLESALE SALES 7

Page

POINT III 9

FERC AND ITS SUPPORTERS HAVE FAILED TO ANSWER THE STATES' DEMONSTRATION THAT THE D.C. CIRCUIT'S TREATMENT OF STRANDED COSTS WAS ERRONEOUS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Chemehuevi Tribe of Indians v. Federal Power Commission, 420 U.S. 395 (1975) 1

Connecticut Light & Power v. Federal Power Commission, 324 U.S. 515 (1944) 3, 7, 8

Duke Power Company v. Federal Power Commission, 401 F.2d 930 (D.C. Cir. 1968) 9

Federal Power Comm'n v. Conway Corp., 426 U.S. 271 (1976) 9

Federal Power Comm'n v. Southern California Edison Co., 376 U.S. 205 (1964) 6, 8

Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453 (1972) ..... *passim*

Food and Drug Administration v. Brown & Williamson Tobacco Corp., __U.S.__, 120 S. Ct. 1291 (2000) 5

Hillsborough County, Florida v. Automated Medical Laboratories, 471 U.S. 715 (1985) 3, 4

Jersey Central Power & Light Co. v. Federal Power Commission, 319 U.S. 61 (1943) 3

Louisiana Public Service Commission v. Federal Communications Commission,, 476 U.S. 355 (1986) 10

Page

Mississippi Power & Light Co. v. Mississippi ex rel Moore, 487 U.S. 354 (1988) 4

Watt, Secretary Of The Interior v. Alaska, 451 U.S. 259 (1981) 5

Statutes:

FPA § 201 [16 U.S.C. § 824] 4,5

FPA § 201(a) [16 U.S.C. § 824(a)] 3, 7, 8

FPA § 201(b) [16 U.S.C. § 824(b)] 1, 6, 7, 8

FPA § 201(c) [16 U.S.C. § 824(c)] 2, 3, 7

FPA § 212(h) [16 U.S.C. § 824(h)] 6, 7

FPA § 301 [16 U.S.C. § 825] 2

The States' October 11, 2000 petition for a writ of certiorari offers numerous reasons why the D.C. Circuit's decision affirming Federal Energy Regulatory Commission (FERC) Order 888 warrants review. Because FERC and its supporters utterly fail to refute the States' arguments – and, in some instances, do not even address them – their briefs inadvertently provide additional support for the States' petition.

POINT I

FERC AND ITS SUPPORTERS HAVE FAILED TO ANSWER THE STATES' SHOWING THAT THE D.C. CIRCUIT APPLIED THE WRONG STANDARD OF REVIEW, MISREAD FLORIDA POWER & LIGHT, RAN AFOUL OF TEACHINGS OF THIS COURT, AND IGNORED THE WILL OF CONGRESS IN AFFIRMING FERC'S PREEMPTION OF STATE REGULATION OF THE TRANSMISSION OF ELECTRICITY FROM SELLERS TO RETAIL CUSTOMERS IN THE SAME STATE.

The D.C. Circuit affirmed FERC's preemption of "retail transmission" (Q3)[1] by reading this Court's decision in Federal Power Comm'n v. Florida Power & Light Co. (FP&L), 404 U.S. 453 (1972), as declaring all transmissions of electricity to be interstate (C32-C33). In the alternative, the Court held that FERC's conclusion that § 201(b) of the Federal Power Act (FPA) granted FERC jurisdiction over all transmissions of electric energy outside of Alaska, Hawaii and Texas warranted deference (C33-C34).

The States' petition describes numerous errors in the D.C. Circuit's decision (Pet. 10-19). FERC does not even attempt to answer several of the States' points, including the D.C. Circuit's erroneous standard of review, the Court's failure to adhere to Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420

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[1] (Letter-number) refers to relevant pages of Petitioners' Appendix.

U.S. 395, 422-424 (1975), or Order 888's inconsistency with state/federal antitrust jurisprudence. The issues that FERC does address are examined below.

A. Florida Power & Light/Deference

FERC, and the D.C. Circuit, read this Court's decision in FP&L as holding that because electrons move elusively throughout the transmission system, all energy should be assumed to be in interstate commerce – even transmission from a generator in the middle of Nebraska to a retail customer 50 feet away. The issue in FP&L was whether the ninth largest electric utility in the United States was a "public utility" under § 301 of the FPA and, therefore, was subject to FERC's accounting jurisdiction. Did its facilities transmit a single electron that was consumed in a state other than in which it was generated (404 U.S. at 461 n.10)? If so, FP&L was a "public utility" and FERC could look at its books. In holding for FERC, the Court found that due to the elusive character of electricity, one or more of the electrons carried by FP&L near the Georgia/Florida border had to oscillate across state lines. The case has no application to FERC's authority to regulate retail transmission because, as FERC emphasized in its briefs to the Court, FERC was not trying to regulate any FP&L service (404 U.S. at 461).

Thus, FP&L does not stand for the proposition that all electrons transmitted to FP&L's retail customers were in interstate commerce. Nor does it suggest they were produced in a different state – the appropriate test under FPA § 201(c) for whether FERC would be able to regulate FP&L's retail transmissions.[2]

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[2] Arguing that FP&L holds that all energy on an integrated grid is a commingled stream of electrons from multiple sources, the Transmission Access Policy Study (TAPS) group claims it is impossible to have direct intrastate transmission from a generator to a customer (TAPS 2-3). While the Court's opinion in FP&L recognized it was, indeed, possible to identify which utilities were generating which loads (404 U.S. at 461-462), TAPS'

The D.C. Circuit's error becomes even more apparent when FP&L is read in concert with Jersey Central Power & Light Co. v. Federal Power Comm'n, 319 U.S. 61 (1943). In Jersey Central, this Court held that: "although a company may be a public utility under subsection (e), all of its transactions do not thereby fall under the regulatory power of the Commission." 319 U.S. at 73. Section 201(a)'s "limitation is directed at generation, transmission and sale" (emphasis added) (319 U.S. at 74). Because § 201(a) prohibits FERC from regulating any activity previously regulated by the states and the states were regulating retail transmission when the FPA was enacted (I4, P3), § 201(a) prohibits FERC from regulating retail transmission. The D.C. Circuit has misread FP&L.

FERC cites this Court's deference to agency interpretations of enabling legislation as support for the D.C. Circuit's deference to FERC's rejection of § 201(a)'s limiting language (FERC 14). Its argument is particularly baseless in light of FERC's failure even to take issue with the following: (1) in Hillsborough County Florida v. Automated Medical Laboratories, 471 U.S. 715 (1985), this Court held that an agency cannot preempt pre-existing state regulation unless preemption is shown to be "the clear and manifest purpose of Congress" (Pet. 10); (2) the States were, in fact, regulating retail transmission when the 1934 Act was passed (I4, H14) and Congress had no intention of disturbing this state regulation (Connecticut Light & Power Co. v. Federal Power Comm'n (CL&P), 324 U.S. 515, 526 (1944); (L10, L12, P4, P23) (Pet. 11); and (3) by FERC's own admission, the FPA does not evidence a clear and manifest purpose of Congress to allow preemption of retail transmission (D100)

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contention is, nonetheless, a red herring. Inasmuch as Congress has defined intrastate transmissions as those between buyers and sellers in the same state (§ 201[c]) and neither bilateral contracts nor intrastate retail tariffs have ever relied on a "tracing" of electrons for their legal efficacy, the elusive nature of electrons is not relevant to FERC's power to preempt state regulation of retail transmission.

["The above legislative history on section 201 . . . does not provide any definitive answers to the questions raised."]. Inasmuch as the D.C. Circuit decision is inconsistent with Hillsborough and FERC has not even attempted to defend the Court's inconsistency, its call for deference rings hollow (see Pet. 8, 9, 11).

TAPS describes the States as contending that Hillsborough raises the preemption bar whenever a federal statute "reserves certain powers to the states" (TAPS 4). Building on its erroneous description of the States' petition, TAPS then reasons that because Justice Scalia's concurring opinion in Mississippi Power & Light Co. v. Mississippi ex rel. Moore (MP&L), 487 U.S. 354, 380-381 (1988), endorsed deference to FERC's reading of the FPA, which reserves certain power to the states, Hillsborough has been undermined (TAPS 4).

The Hillsborough requirement that there be clear evidence of congressional intent to preempt does not apply to every case where a statute has reserved power to the states. Hillsborough raises the standard for preemption when there is an attempt to preempt fundamental state regulation that preceded enactment of a federal statute. Inasmuch as the Court in MP&L, did not hold that the case involved preemption of pre-existing state regulation, Justice Scalia's concurrence in MP&L cannot be read as undermining Hillsborough. Further, even if MP&L had involved preemption of fundamental state regulation that preceded the FPA, TAPS' argument would still fail because Justices Brennan, Marshall and Blackman all differed with Justice Scalia on whether FERC's reading of limiting language warranted deference. Finally, Justice Stevens, writing for the majority, did not address this matter. TAPS' reliance on MP&L is misplaced.[3]

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[3] TAPS' reference to FP&L is equally baseless. FP&L did not involve preemption. In the FPC's words, "[t]he only immediate effect of the Commission's order in this case will be to require FPL to follow the

B. FERC's Reversal of Position

As this Court held in Food and Drug Admin. v. Brown & Williamson Tobacco Corp., __ U.S. __, 120 S. Ct. 1291, 1312-1314 (2000), a federal agency's prior assurances to Congress are relevant to subsequent jurisdictional disputes. The States' petition points out that the D.C. Circuit's adoption of FERC's reading of FP&L, and its deference to FERC's reading of § 201, were further undermined by FERC's prior assurances to Congress that the elusive electron, or commingling, theory had no relevance to the states' regulation of retail matters (Pet. 14). In opposing certiorari, FERC does not deny (or even discuss) its previous insistence that commingling of electrons should have no bearing on the states' jurisdiction of retail services.[4] It argues, however, that its current position – that FP&L's recognition of commingling justifies federal preemption of retail transmission – should not invoke Food and Drug Admin. because FERC's new position was precipitated by unbundling and the advent of competition (FERC 14). Inconsistent statements to Congress (and the courts) are no less problematic when they are precipitated by alleged technological change. FERC's latest position directly conflicts with the assurances it provided Congress in opposing amendments to the FPA that would have preserved state jurisdiction over retail matters. The contradictions further establish why FERC's current position does not warrant deference. Watt v. Alaska, 451 U.S. 259, 273 (1981) ["the Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference"].

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[4] Our petition confused a FERC decision and a Circuit Court decision when it described FPC Chairman White's 1967 testimony as following the Fifth Circuit's decision in FP&L (Pet. 14). The 1967 Congressional Hearings were held in response to the FPC's decision asserting authority over FP&L, 37 F.P.C. 544, decided March 20, 1967.

C. Section 212(h)

The State's petition establishes that Congress expressly preserved state authority over retail transmission in 1992 when it enacted FPA § 212(h) (Pet. 16). In response, FERC suggests that because § 212(h) "simply prohibits FERC from ordering transmission directly to an ultimate consumer" it does not support the States' position (FERC 15). Congress in 1992 (20 years after FP&L) would not have painstakingly safeguarded state regulation of retail transmission ["State law concerning the transmission of electric energy directly to an ultimate consumer" (§ 212(h))] if it had intended FERC to preempt state regulation of retail transmission.

D. The Retail/Wholesale "Bright Line"

The States' petition states that the D.C. Circuit's decision conflicts with the wholesale/retail "bright line" enunciated in FPC v. Southern Cal. Edison, 376 U.S. 205, 215 (1964) (Pet. 17). In response, FERC argues that Order 888 passes muster because the line only draws a distinction between transmission and distribution facilities (FERC 15-16). The bright line of FPC v. Southern Cal. Edison divides not transmission from distribution facilities, but retail services from wholesale services – with retail services being regulated by the states (L33-34). 376 U.S. at 214 [Congress adopted a test "which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'"].[5]

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[5] Footnote 6 of Southern Cal. Edison (376 U.S. at 210 n.6) – cited by FERC as acknowledging the "absence of such a bright line" (FERC 16) – actually protected the retail/wholesale bright line by observing that the mere incidence of retail sales on low voltage wires used predominately to effectuate wholesale sales did not invoke § 201(b)'s local distribution exemption and prevent FERC from regulating all aspects of the wholesale sale, because FERC could rationally define the wires as wholesale transmission facilities.

E. Order 888's Impracticality

The State's petition observes that in directing that retail transmission rates for millions of customers throughout the nation will be set by FERC, Order 888 is not only impractical, but counterproductive to FERC's pro-competition policy (Pet. 18). In response, FERC quotes its own extra-record observation that many states have ordered retail unbundling "even after Order No. 888 ..." (FERC 17). What FERC does not address is where the states could have been if Order 888 had not pre-empted the states on retail transmission.

The D.C. Circuit's decision applied the wrong standard of judicial review; it misread FP&L; it ignored language limiting FERC's jurisdiction in §§ 201(a), 201(c) and 212(h); and it overstepped this Court's retail/wholesale bright line. The Court should grant review.

POINT II

FERC HAS FAILED TO JUSTIFY THE D.C. CIRCUIT'S AFFIRMANCE OF ITS PRE-EMPTION OF STATE REGULATION OF LOCAL DISTRIBUTION FACILITIES USED FOR WHOLESALE SALES.

The States' petition argues that the D.C. Circuit's affirmance of FERC preemption of wholesale local distribution regulation cannot be reconciled with § 201(b)(1) of the FPA, which denies FERC jurisdiction "over facilities ... used in local distribution" (States 19-21). The petition also notes that the D.C. Circuit failed to abide by CL&P, 324 U.S. 515, 531 (1944), wherein this Court held that § 201(b)(1)'s denial of jurisdiction was not conditioned on the type of electricity being carried by the utility (Pet. 20). Finally, the States assert that FERC's preemption of wholesale distribution facilities invites sham transactions (Pet. 21).

In response, FERC argues that § 201(b)'s jurisdictional limitations give way to § 201(a) which, in FERC's view, empowers FERC to regulate all aspects of wholesale sales (FERC 17). Further, FERC disputes that CL&P upholds state regulation of local distribution facilities that carry energy to recipients who resell it (FERC 17-18).

FERC's position is contrary to § 201(b), CL&P and this Court's teaching in FPC v. Southern Cal. Edison, 376 U.S. at 216, that FERC has jurisdiction over wholesale sales "except those reserved to states," such as local distribution (376 U.S. at 210 n.6). As noted above (n.5), n.6 of FPC v. Southern Cal. Edison, 376 U.S. at 210 n.6, observes that, assuming a rational basis, FERC may define low voltage wires as wholesale transmission facilities and thereby evade § 201(b)'s exemption, but it may not define the facilities as local distribution and preempt state regulation on a theory that the local distribution facilities are used for wholesale sales.[6]

As this Court noted in CL&P, § 201(b)'s denial of FPC jurisdiction "loomed importantly in the minds and speech of its sponsors, perhaps was necessary to get the bill passed, and is one which the Commission must observe and the courts must enforce." 324 U.S. at 529. The D.C. Circuit has not done so.[7]

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[6] TAPS claims the states are trying to regulate wholesale sales on low voltage distribution systems (TAPS 5-6). The States' position is that the rule of law should be observed. Hence, if FERC defines systems as local distribution, it may not preempt state jurisdiction over such systems (Pet. 20-21).

[7] FERC suggests that there is no risk of sham transactions because Order 888 promises FERC will intervene on a case-by-case basis to avoid such wrongdoing. With all due respect, FERC's staff is hardly in a position to oversee rates for 2.5 million miles of distribution facilities. Further, the states should not be required to bring grievances to FERC over facilities that were expressly reserved to their jurisdiction by Congress.

POINT III

FERC AND ITS SUPPORTERS HAVE FAILED TO ANSWER THE STATES' DEMONSTRATION THAT THE D.C. CIRCUIT'S TREATMENT OF STRANDED COSTS WAS ERRONEOUS.

In affirming FERC's holding that, when state law denies rate recovery, FERC will sit in review of utility requests for recovery of costs stranded due to retail competition, the D.C. Circuit held that FERC's position did not impinge on state ratemaking (C81-C83). The States' petition shows that FERC's decision does, in fact, trivialize state retail rate decisions and is illogical because numerous factors, only one of which is open access, can cause (and are needed for) retail competition (Pet. 23).

In response, FERC contends that the fact that utility "stranded" costs were intended to serve retail customers is irrelevant because "rates are jurisdictional; costs are not" (FERC 20). FERC's assertion ignores Federal Power Commission v. Conway Corp., 426 U.S. 271, 278 (1976) [wherein the Court noted that wholesale rates, in order to be just and reasonable, should not include non-jurisdictional, retail sales].

FERC also attempts to downplay the significance of Order 888's intrusion into state ratemaking by contending that no state law has triggered the need for a FERC backstop (FERC 20). In the words of FPC Commissioner Seavey, when the FPA was enacted, "matters of a local nature ... should be handled locally and should receive the consideration of local men familiar with the local conditions in the communities involved." Hearings on H.R. 5423 at 393, quoted in Duke Power Co. v. Federal Power Commission, 401 F.2d, 930, 936 (D.C. Cir. 1968). The very existence of Order 888 limits the discretion of state legislators to resolve the rate treatment of costs incurred to serve retail customers, a particularly local matter.

In affirming FERC's directive that it would be the "primary forum" for deciding the rate treatment of utility costs incurred to serve retail customers, but "stranded" when a municipality decides to buy power from a utility competitor, the D.C. Circuit concluded that FERC was entitled to jurisdiction over such rate issues because its open access policy caused municipalization, which, in turn, caused retail costs to be stranded (C90). The States' petition pointed out, however, that an agency derives authority from its enabling legislation, not attenuated principles of causation (Pet. 24). See Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 374 (1986) ("[a]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it .... An agency may not confer power upon itself.")

In reply, FERC quotes the D.C. Circuit's opinion and concludes, without explanation, that the D.C. Circuit was correct. If causation determines jurisdiction then, as FERC Commissioner Massey noted, it is state, not federal law, that allows municipalization (61 Fed. Reg. at 21736). As former FERC Chairman Hoecker emphasized, FERC's "primary forum" approach (1) requires FERC to second-guess state determinations on the rate treatment of retail costs; (2) encourages forum-shopping; and (3) is inconsistent with FERC's past practices on retail wheeling matters (61 Fed. Reg. at 21735-36).

CONCLUSION

The States' petition demonstrates that the D.C. Circuit decision affirming FERC Order 888 directly conflicts with numerous Supreme Court decisions and is inconsistent with the will of Congress. In their opposition to certiorari, FERC and its supporters fail to show otherwise. The Petitioners speak for 66 million citizens when they ask this Court to review the D.C. Circuit's decision.

Respectfully submitted,

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